

48 Op. Att'y Gen. No. 26

APPROPRIATIONS - Encumbrance and reversion of funds appropriated but unexpended at close of fiscal year;

COAL SEVERANCE TAX TRUST FUND - Reversion at close of fiscal year of funds appropriated for Microbusiness Development Program;

COMMERCE, DEPARTMENT OF - Authority to encumber appropriated but unexpended funds after fiscal year-end;

CONTRACTS - Loan agreements entered into after fiscal year-end;

ADMINISTRATIVE RULES OF MONTANA - Rule 8.99.505(3) (1997);

MONTANA CODE ANNOTATED - Sections 17-6-402(2), -407, -407 (1995), 17-7-302, -302(1), -304(1), 27-1-105;

MONTANA CONSTITUTION - Article VIII, section 9;

OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 4 (1983).

HELD:

The Department of Commerce may not encumber unexpended funds from an appropriation for the Microbusiness Development Program by committing those funds after fiscal year-end.

December 29, 2000

Peter S. Blouke, Ph.D., Director
Department of Commerce
P.O. Box 200501
Helena, MT 59620-0501

Dear Dr. Blouke:

You have requested an Attorney General's Opinion concerning the use of an appropriation to the Department of Commerce (Department) from the Coal Severance Tax Trust Fund (Coal Tax Fund) for purposes of the Microbusiness Development Program. Your inquiry arises as a result of an audit which led to a dispute between the Department and the Legislative Auditor about whether the funds are validly encumbered and thus available for use by the Department, or whether they should have reverted to the Coal Tax Fund in accordance with Mont. Code Ann. § 17-7-304(1). The following background information is relevant to your inquiry.

The Department of Commerce administers the Microbusiness Development Program pursuant to grant of authority under the Microbusiness Development Act, Mont. Code Ann. §§ 17-6-401 to -411. The purpose of the program is to foster development of small businesses in Montana. Mont. Code Ann. § 17-6-402(2). This is accomplished through a revolving loan fund from which the Department makes development loans to regional Microbusiness Development Corporations (MBDCs), which in turn loan funds to small businesses. The funds for these loans come from an appropriation made to the Department by the legislature from the Coal Tax Fund. Mont. Code Ann. § 17-6-407 (1995).

In June 1997, the Department entered into commitments with several MBDCs to loan funds contingent upon the MBDCs providing matching funds by September 30, 1997. When no matching funds were received by that date, however, the Department amended the contracts to extend the time period for matching funds until September 30, 1999.

The Legislative Auditor discovered the encumbrances during a recent audit and determined that the funds were validly encumbered to September 30, 1997. When the contingency did not occur by that date, however, the Auditor considered the funds no longer validly encumbered and concluded that they should have reverted to the Coal Tax Fund. The Department responds that the funds were validly encumbered beyond September 30, 1997, by virtue of the contract amendments extending the contingency for another two years. The question presented then is whether the Department has legal authority to retain funds

allocated to it under Mont. Code Ann. § 17-6-407 by amending certain loan agreements for an additional two-year period.

Montana law contemplates that an appropriation for a specific purpose will revert to the fund or account from which it was originally appropriated after the expiration of the time for which it was appropriated. Mont. Code Ann. § 17-7-304(1). Appropriations for an unspecified period of time must revert at the end of the biennium in light of the balanced budget requirement of article VIII, section 9 of the Montana Constitution. The appropriation in question was subject to reversion on June 30, 1997. The Department, however, attempted to avoid reversion by encumbering the funds to September 30, 1997, and then to September 30, 1999.

Encumbrances of fiscal year-end obligations are authorized by Mont. Code Ann. § 17-7-302, which provides in relevant part:

(1) Any valid obligation not paid within the fiscal year, including valid written interagency or intra-agency service agreements for systems development, shall be encumbered for payment thereof at the end of each fiscal year in the department of administration's accounts. Except as provided in subsection (2), an appropriation shall be deemed to be encumbered at the time and to the extent that a valid obligation against the appropriation is created.

The operative wording of this statute is "valid obligation." This phrase was construed in 40 Op. Att'y Gen. No. 4 (1983), in which former Attorney General Mike Greely observed the significance of the term "obligation" as connoting a legally binding duty to perform or refrain from performing an act. 40 Op. Att'y Gen. No. 4 at 17, citing Mont. Code Ann. § 27-1-105; Kinsman v. Stanhope, 50 Mont. 41, 47, 144 P. 1083, 1084 (1914).

By its own rule, the Department had the authority to enter into a legally binding commitment with the MBDCs for up to three months, with the contingency that cash collateral be forthcoming. Montana Administrative Rule 8.99.505(3) (1997) provided:

In order to assist an MBDC in obtaining collateral from other sources, the department may provide a legally binding commitment to an MBDC to award a development loan, contingent upon receipt and deposit of cash collateral as specified in the loan agreement. Such a commitment must have an expiration date; the duration of such commitment may be no longer than one calendar quarter, so that commitments to MBDCs without collateral cash on hand do not unreasonably delay lending to MBDCs with cash collateral ready and available.

This created a valid encumbrance until September 30, 1997. Once the contingency expired, however, the Department had no authority to contract further in order to encumber funds. Mont. Code Ann. § 17-7-302 contemplates that the encumbrances arise as a result of a legally binding duty created during the fiscal year in which the funds were available--in other words, prior to June 30, 1997. There is no provision in the law for encumbering funds after fiscal year-end. Any such provision would directly conflict with the statute requiring reversion of unexpended funds, Mont. Code Ann. § 17-7-304(1).

This is not to say, however, that the Department could have entered into a legally binding commitment for more than two years *prior to* the expiration of the fiscal year. While that question is not presented here, it appears that such a commitment would be an end-run around Montana's biennial budget process and the reversion provisions of Mont. Code Ann. § 17-7-304(1).

Since the Department's commitments were made after fiscal year-end, they do not constitute a valid obligation under Mont. Code Ann. § 17-7-302. The fact that there was a legally binding obligation in place to September 30, 1997, is of no consequence. Once the contingency expired on that date, so did the Department's legal obligation. The Department has no inherent authority to encumber funds in any other manner than that prescribed by statute. 40 Op. Att'y Gen. No. 4 at 17. Thus, any unexpended balance from the appropriation should have reverted to the Coal Tax Fund pursuant to Mont. Code Ann. § 17-7-304(1) as of that date.

THEREFORE, IT IS MY OPINION:

The Department of Commerce may not encumber unexpended funds from an appropriation for the Microbusiness Development Program by committing those funds after fiscal year-end.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/jma/dm